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In the Supreme Court of the United States

OCTOBER TERM, 1979

FIRST MULTIFUND FOR DAILY INCOME, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-10a) is reported at 602 F. 2d 332.

JURISDICTION

The judgment of the Court of Claims was entered on July 18, 1979. A petition for rehearing was denied on September 28, 1979 (Pet. App. 11a). The petition for a writ of certiorari was filed on December 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether re-registration of an open-end investment company's shares is required under the Securities Act of 1933 when the shares are redeemed and later resold to public investors.

STATUTE INVOLVED

Section 6 of the Securities Act of 1933, 15 U.S.C. 77f, provides in pertinent part:

> (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement * * *. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.
>
> (b) At the time of filing a registration statement the applicant shall pay to the Commission a fee of one-fiftieth of 1 per centum of the maximum aggregate price at which such securities are proposed to be offered, but in no case shall such fee be less than $100.

STATEMENT

1. Petitioner is registered with the Securities and Exchange Commission under the Investment Company Act of 1940 as an open-end diversified management investment company, commonly known as a mutual fund. By definition, "open-end" investment companies offer for sale securities that are redeemable at the option of the holder.[1] Typically, these companies continuously issue and redeem shares and periodically register additional shares for sale to the public under the Securities Act of 1933. The Securities and Exchange Commission has interpreted Section 6(a) of the Securities Act, 15 U.S.C. 77f(a), to require re-registration of shares that have been redeemed or repurchased by an investment company prior to public resale.

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[1]See Section 2(a)(32) of the Investment Company Act, 15 U.S.C. 80a-2(a)(32).

In order to accomodate open-end investment companies in the periodic registration of additional shares, the Investment Company Act provides a means by which these companies can register additional shares under the Securities Act by amendment of a current registration statement (a "post-effective" amendment) rather than by means of a new registration statement.[2] A substantial portion of the securities registered pursuant to post-effective amendments by open-end investment companies consists of shares that previously have been redeemed or repurchased. Because the ordinary method of fee calculation for registering such securities[3] could result in unduly high registration costs, the Commission proposed and adopted in 1977 an optional, less expensive, method of fee calculation for shares registered by post-effective amendment.[4] In essence, the new method of calculation requires the payment of fees only for those shares registered in excess of the number of shares redeemed or repurchased in the previous fiscal year.[5]

2. Prior to March 1978, petitioner had registered 1,650,000 of its shares under the Securities Act. In March 1978, it registered a total of 4,660,591 shares and

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[2]See Section 24(e)(1) of the Investment Company Act, 15 U.S.C. 80a-24(e)(1).

[3]See Section 6(b) of the Securities Act, 15 U.S.C. 77f(b), and Section 24(e)(1) of the Investment Company Act, 15 U.S.C. 80a-24(e)(1).

[4]See Rule 24e-2 under the Investment Company Act, 17 C.F.R. 270.24e-2

[5]See Securities Act Release No. 5817, 42 Fed. Reg. 15922 (1977); Securities Act Release No. 5836, 42 Fed. Reg. 31781 (1977) (Pet. App. 18a-26a).

paid a registration fee of $9,833.[6] Petitioner chose to register those shares by means of a new registration statement rather than a post-effective amendment. In May 1978, petitioner filed suit in the Court of Claims seeking to recover the $9,833 registration fee, claiming that the fee was paid for re-registration of previously registered shares[7] and that the fee violated Section 6(b) of the Securities Act and constituted a taking of petitioner's property in violation of the Fifth Amendment (Pet. App. 3a).

The Court of Claims granted summary judgment against petitioner, holding that re-registration of shares issued by an open-end investment company is required when previously registered shares are redeemed and subsequently resold (Pet. App. 1a-2a). The court concluded that the plain language of Section 6 of the Act supported the long-standing administrative interpretation

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[6]This fee included $500 for the filing of a "declaration" that enabled petitioner to register an indefinite number of shares for sale in the future (see Pet. App. 3a n.1). The filing of a declaration permits a company to sell any number of shares during a given year, provided that within six months after the close of the fiscal year in which the declaration is in effect the company files a notice listing the exact number of shares sold. A registration fee is then calculated on the basis of the aggregate sale price of shares sold, reduced by the aggregate redemption or repurchase price of securities redeemed or repurchased by the issuer during the previous fiscal year. See Rule 24f-2 under the Investment Company Act, 17 C.F.R. 270.24f-2; Securities Act Release No. 5881, 42 Fed. Reg. 58400 (1977).

[7]Petitioner's claim that all 4,660,591 shares had previously been registered is based on the registration of 1,650,000 shares pursuant to five registration statements filed between August 1974 and February 1977 and the purported additional registration of 3,010,591 shares pursuant to certain post-effective amendments to its registration statements. However, such post-effective amendments do not become effective unless so declared by the Commission. See Section 8(c) of the Securities Act, 15 U.S.C. 77h(c). The Commission never declared petitioner's post-effective amendments to be effective (Pet. App. 3a & n.2).

that a registration statement and accompanying registration fee cover only the specific securities proposed to be offered in an initial distribution and do not cover a subsequent distribution or resale by the issuer after it has redeemed the securities (*id.* at 4a-5a).

In reaching this conclusion, the court noted that the Commission's interpretation of Section 6 does not require the payment of a double registration fee because the payment of an additional fee is required only when shares are resold (Pet. App. 10a). The court also observed that the financial burden on petitioner was at least partially the result of its own actions, because it failed to utilize the post-effective amendment procedures adopted by the Commission in 1977 that would have provided a credit for shares that it had redeemed in the previous fiscal year (*ibid.*).

ARGUMENT

The decision of the Court of Claims, on which we generally rely, is correct and does not conflict with any decision of this Court or any other court. Further review by this Court is not warranted.

1. In granting summary judgment against petitioner, the Court of Claims approved the Commission's long-standing interpretation of Section 6(a) of the Securities Act. The last sentence of Section 6(a) provides that "[a] registration statement shall be deemed effective *only as to the securities specified therein as proposed to be offered*" (emphasis supplied). Since 1938, the Commission has construed this provision to mean that registration statements are effective only as to the shares that the issuer presently intends to offer for sale. See *In the Matter of United Combustion Corp.*, 3 S.E.C. 1062, 1063 (1938); *In the Matter of Shawnee Chiles Syndicate*,

10 S.E.C. 109, 113-114 (1941); see also *Resources Corporation International* v. *SEC*, 103 F. 2d 929, 932 (D.C. Cir. 1939). As the Commission has noted, "[t]he policy of * * * Section 6(a) is to assure investors that the registration statements and prospectuses on which they rely, so far as is reasonably possible, provide current information." *In the Matter of Shawnee Chiles Syndicate*, *supra*, 10 S.E.C. at 113. Congress acknowledged the correctness of this interpretation when the securities laws were subsequently amended.[8]

The Commission has consistently applied this prohibition against registration of securities long before sale ("shelf registration") by requiring re-registration of investment company shares that have been redeemed or repurchased and are offered for resale. Affidavits of Commission staff members submitted to the Court of Claims established that this requirement has been imposed since at least 1954 (Pet. App. 5a-6a).

Petitioner nonetheless contends (Pet. 9) that the Commission's interpretation requiring re-registration of redeemed shares "was kept secret and * * * was available only upon request." There is no basis for this assertion. Petitioner cites no evidence that investment companies were unaware of or have not generally complied with the re-registration requirement. Moreover, the Commission's

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[8]When the securities laws were amended in 1954, the Senate Committee approved the Commission's interpretation:

> Section 6(a) of the Securities Act, which provides that securities may be registered by filing a registration statement, permits the registration only of securities proposed to be offered, *i.e.*, the number of shares or units expected and intended to be offered and sold in the proximate future. It does not permit "registration for the shelf."

S. Rep. No. 1036, 83d Cong., 2d Sess. 10 (1954).

1977 release published in the Federal Register (see page 3, *supra*), which proposed an alternative method for computing registration fees paid by investment companies, specifically described the long-standing re-registration requirement. Thirty-two of the thirty-four letters of comment received by the Commission favored the adoption of this proposal (Pet. App. 19a-20a). None of the thirty-two commentators claimed surprise or disagreed with the Commission's re-registration interpretation.

2. Petitioner also argues (Pet. 6-7) that the re-registration requirement conflicts with relevant legislative history and is arbitrary and capricious. These contentions rest on a single statement included in a congressional committee report (Pet. 7) and petitioner's assertion that the re-registration requirement "serves no useful purpose" (Pet. 8).

a. The committee report that petitioner relies on merely observes that:

> [The Securities Act of 1933] does not affect the ordinary redistribution of securities unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering.

H.R. Rep. No. 85, 73d Cong., 1st Sess. 5 (1933). This passage refers to securities issued by ordinary corporate issuers, not investment companies that are continuously engaged in the redemption and redistribution of their shares. Moreover, rather than supporting petitioner's position, the quoted passage shows that Congress viewed a redistribution of securities, even by persons other than the issuer, as functionally identical to a new offering when those persons "control" the issuer. A fortiori, re-registration is required when the shares are offered for

resale by the issuer itself. This Court implicitly recognized the character of investment company shares that are redeemed and resold when, in a description of the operation of mutual funds, it noted that "[i]n order to avoid liquidation through redemption, mutual funds continuously issue and sell *new* shares." *United States* v. *National Association of Securities Dealers*, 422 U.S. 694, 698 (1975) (emphasis supplied).[9]

b. Petitioner also argues that "re-registration serves no useful purpose" (Pet. 8) and that Section 6(a) therefore should not be deemed to require re-registration.

However, the Securities Act's re-registration requirement applies to all issuers subject to the Act, including investment companies. It assures that each investor purchasing shares in a distribution receives material information about the issuer and is afforded protection against misstatements in the registration statement. Section 11 of the Securities Act, 15 U.S.C. 77k, provides for civil liability for material misstatements in, or omissions from, a registration statement.[10] That liability expires three years after the date the security is first *bona fide* offered to the public (Section 13 of the Securities Act, 15 U.S.C. 77m), and rests on the deceptive nature of statements or omissions at the time when the registration statement becomes effective. Thus, allowing

[9]Petitioner claims that its sales and purchases occurred in the *secondary* market. But, as this Court has stated, "[t]he distribution-redemption system constitutes the primary market in mutual-fund shares." *United States* v. *National Association of Securities Dealers*, *supra*, 422 U.S. at 699. Secondary market transactions are "between dealers, from an investor to a dealer, and between investors through brokered transactions." *Id.* at 700.

[10]Section 11 was intended to assure that registration statements would be carefully and accurately prepared. See Douglas & Bates, *The Federal Securities Act of 1933*, 43 Yale L.J. 171, 173 (1933).

issuers to register securities long before they are sold, or to re-acquire their own securities and then resell them without re-registration, would undermine the protections provided by Section 11. Some investors might purchase shares resold by the issuer after the three-year limitations period had run. Moreover, even if the purchases were made within three years, the investors would have no remedy under Section 11 if the registration statement was correct when it became effective but became false or misleading through the passage of time.

It is true that Section 24(e) of the Investment Company Act, 15 U.S.C. 80a-24(e), requires open-end investment companies to file updated prospectuses as post-effective amendments to their registration statement[11] and provides that the effective date of such a registration statement shall be the effective date of the amendment.[12] Furthermore, Section 24(e) provides that the three-year limitations period in Section 13 of the Securities Act commences to run on the effective date of the amendment. Thus, as to a limited category of issuers, including open-end investment companies, the re-registration requirement may not be necessary in order to afford investors the protections of Section 11 of the Securities Act. However, petitioner's contention that shares once registered are always registered cannot logically be confined to investment companies. Petitioner's contention depends on an interpretation of Section 6(a) of the Securities Act and thus would apply to issuers generally. The Commission was not obligated

[11]Prospectuses must be updated if they are distributed more than nine months after the effective date of the registration statement. See Section 10(a)(3) of the Securities Act, 15 U.S.C. 77j(a)(3).

[12]Section 24(e), which is contained in the Investment Company Act, does not apply to issuers other than investment companies.

to attempt to construe the Securities Act to exempt investment companies from the general requirements of Section 6(a) simply because additional safeguards have been provided to investors under the Investment Company Act, particularly in view of the steps that it has taken to mitigate the economic burdens associated with the re-registration of investment company shares (see page 3, *supra*).

c. The Commission's interpretation of Section 6(a), which applies to all categories of issuers including investment companies, agrees with the literal text of the statute and provides effective protection to investors as contemplated by Congress. That long-standing interpretation was properly upheld by the Court of Claims pursuant to the principle that the construction of a statute by the administrative agency charged with its enforcement should be followed unless there are compelling indications that it is wrong. See *E.I. duPont deNemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *United States* v. *National Association of Securities Dealers*, *supra*, 422 U.S. at 719; *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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